

Sarah E. Piepmeier (SBN 227094)
Elise S. Edlin (SBN 293756)
May Eaton (SBN 298123)
PERKINS COIE LLP
505 Howard Street, Suite 1000
San Francisco, California 94105
spiepmeier@perkinscoie.com
eedlin@perkinscoie.com
mayeaton@perkinscoie.com
Telephone: (415) 344-7000
Facsimile: (415) 344-7050

Attorneys for Defendant Cisco Systems, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NETFUEL, INC.,)	CASE NO. 5:18-cv-2352-EJD (NMC)
)	
<i>Plaintiff,</i>)	CISCO SYSTEMS, INC.'S
v.)	OPPOSITION TO NETFUEL'S
CISCO SYSTEMS, INC.,)	ADMINISTRATIVE MOTION FOR
)	LEAVE TO FILE SUR-REPLY
<i>Defendant.</i>)	
)	

NetFuel's request for leave to file a sur-reply should be denied because Cisco did not raise new arguments in its Reply brief. There are three independent reasons to deny this request.

First, NetFuel alleges Cisco raised the following argument for the first time on reply: "Cisco claims that it could not have known NetFuel intended to rely on the 2008 PlexOS license to BNP Paribas because NetFuel disclosed licensing materials involving Bank of America rather than BNP Paribas." NetFuel's Admin. Mot. (Dkt. 318) at 2. This assertion plainly overlooks the portion of Cisco's Opening Motion devoted to this exact argument:

NetFuel's Preliminary and First Supplemental Damages Contentions contained only scant reference to PlexOS, NetFuel's now defunct product, and *no express mention of the purported 2008 software license to BNP Paribas*. See Eaton Decl., Ex. 13 (NetFuel's Prelim. Damages Contentions); *id.*, Ex. 14 (NetFuel's 10/3/2019 First Suppl. Damages Contentions). Likewise, *NetFuel's First Supplemental Response to Interrogatory No. 15 regarding reasonable royalties identified six documents solely by their Bates numbers with no narrative description, including documents concerning Bank of America, but did not describe or reference any description of a theory of recovery based on the purported 2008 license to BNP Paribas*. See *id.*, ¶ 6.

Cisco's Mot. (Dkt. 309) at 8 (emphasis added); see also *id.* at 3, 10–11. Cisco not only made this argument in its Motion, but also dedicated several paragraphs to why NetFuel's list of bates numbers was insufficient to disclose its new royalty theory. *Id.* at 8, 10–11. Thus, this is not a proper subject for a sur-reply. See e.g., *Sekera v. Allstate Ins. Co.*, 763 F. App'x 629, 632 (9th Cir. 2019) (affirming district court's denial of sur-reply because defendant "did not introduce new arguments in its reply to warrant the surreply").

Second, NetFuel implies that it was improper for Cisco to have "attache[d] a copy of a 2008 end user license agreement [EULA] for the first time as evidence." Dkt. No. 318 at 2. Cisco attached bates no. NETFL0001162—a EULA with Bank of America—to rebut the incorrect claim in NetFuel's Opposition that "[e]ach of these documents related to the 2008 PlexOS license to BNP Paribas NetFuel had already disclosed in its original response [to Interrogatory No. 15]. *The license agreement itself, which is what this interrogatory [no. 15] sought, was already disclosed in NetFuel's original response. See Ex. 8 (listing end user license agreement at NETFL00001162).*" Opp. (Dkt. 313) at 4 (emphasis added); see also *id.* at 8. That Cisco is rebutting the Opposition is clear, because its Reply expressly cites to and disagrees with the relevant portion of NetFuel's Opposition when describing the

1 exhibit:

2 ***NetFuel argues that Bates No. NETFL00001162 is a 2008 BNP Paribas license, but***
 3 ***it is, in fact, an End User License Agreement between NetFuel and Bank of America***
 4 ***that contains no terms of any agreement with BNP Paribas and states that BNP Paribas***
 5 ***would have to execute a separate “software license agreement” with NetFuel “within a***
 6 ***reasonable period of time. See Opp. at 4; Eaton Decl., Ex. 16 (NETFL00001162) at***
 7 ***4. NetFuel has yet to even produce this separate software license.***

8 Cisco’s Reply (Dkt. 316) at 9 n.3 (emphasis added). Cisco’s rebuttal of NetFuel’s Opposition does
 9 not warrant a do-over for NetFuel, something which this Court already addressed in denying its Motion
 10 for Reconsideration of the Court’s *Daubert* ruling. See Order (Dkt. 305) at 3 (“Thus, Defendant’s
 11 reply brief did not ‘raise an issue for the first time.’ Instead, the reply brief replied to an issue that
 12 Plaintiff raised; something Defendant was permitted to do.”); see also *Heil Co. v. Curotto Can Co.*,
 13 No. 04-1590 MMC, 2004 WL 2600134, at *1 n.1 (N.D. Cal. Nov. 16, 2004) (denying defendant’s
 14 request for leave to file a sur-reply where “[c]ontrary to defendant’s argument, plaintiff’s reply does
 15 not raise new legal arguments, but, rather, responds to legal arguments made in defendant’s
 16 opposition”), *aff’d per curiam*, 163 F. App’x 908 (Fed. Cir. 2006).

17 Finally, NetFuel contends that it needs to address “incorrect factual assertions, as NetFuel’s
 18 proposed surreply shows.” Dkt. 318 at 2. But the arguments that NetFuel seeks to introduce in its
 19 proposed sur-reply are all arguments it could have made in its Opposition—and none details an
 20 “incorrect factual assertion.” For example, NetFuel seeks to characterize documents it cites in its
 21 Preliminary Damages Contentions and its original response to Interrogatory No. 15 as purportedly
 22 suggesting “that Bank of America would transfer the PlexOS license to BNP Paribas.” Mot., Ex. 1,
 23 Proposed Sur-Reply (Dkt. 318-03) at 1–2. Setting aside that this claim is wholly inaccurate, this is, as
 24 explained above, an argument directly responsive to Cisco’s Opening Motion, where Cisco clearly
 25 stated that it could not divine from a handful of Bank of America documents that NetFuel would
 26 advance a royalty theory based on a separate (apparently non-existent) alleged software license
 27 agreement with BNP Paribas. See Dkt. 309 at 8; see also *id.* at 3, 10–11.

28 For the forgoing reasons, Cisco respectfully requests that the Court decline NetFuel’s request
 to file a sur-reply. Should the Court permit NetFuel to file a sur-reply, Cisco respectfully requests the
 opportunity to submit a sur-sur-reply of equal length.

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PERKINS COIE LLP

By: /s/ Sarah E. Piepmeier

Sarah E. Piepmeier (SBN 227094)

Elise S. Edlin (SBN 293756)

May Eaton (SBN 298123)

PERKINS COIE LLP

505 Howard Street, Suite 1000

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